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MCCANN FITZGERALD

OUR REF

NOB\4054176.1

YOUR REF

DATE

30 November 2011

Mr Gavin Sheridan

Room 205

Business Incubation Centre

National College of Ireland

Dublin 1

BY HAND

Irish Bank Resolution Corporation Limited v The Commissioner For

Environmental Information and Gavin Sheridan, 2011 389 MCA

Appeal of the decision of the Environmental Information Commissioner,

CEI/10/0007

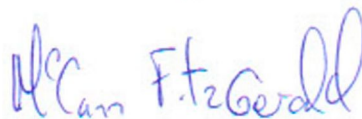
Our client: Irish Bank Resolution Corporation Limited

Notice of Motion returnable 19 December 2011

Dear Mr Sheridan

We enclose by way of service notice of motion and affidavit of Niamh O'Brien sworn on 28 September 2011 together with exhibits.

Yours faithfully

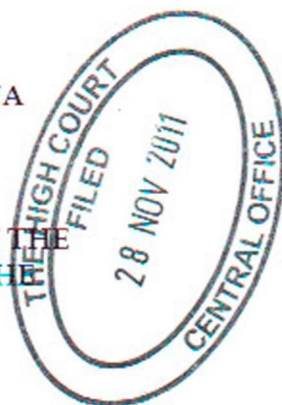


McCann FitzGerald

Record No: 2011/329 MCA

THE HIGH COURT

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13(1) OF THE
EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE
ENVIRONMENT) REGULATIONS 2007



Between:-

IRISH BANK RESOLUTION CORPORATION LIMITED (Formerly known as
ANGLO IRISH BANK CORPORATION LIMITED)

Appellant

-and-

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent

-and-

GAVIN SHERIDAN

Notice Party

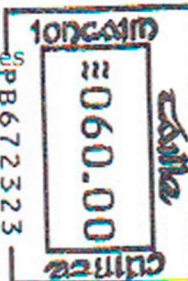
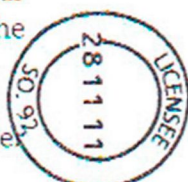
NOTICE OF MOTION

TAKE NOTICE that on the ^{19th} ~~28~~ day of ^{December} ~~November~~ 2011 at 11.00 o'clock in the forenoon, or as soon thereafter as Counsel may be heard, an application will be made to the High Court, sitting at Four Courts, Inns Quay, in the County of the City of Dublin for:-

1. An order pursuant to Article 13(1) of the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No 133 of 2007) setting aside the Decision made by the Respondent on 29 September 2011 (as notified to the Appellant on 30 September 2011), in Case Number CEI/10/0007, to the effect that the Appellant is a public authority under subparagraph (vii) of Article 3(1) of the said Regulations on the basis that the said Decision is vitiated by an error (or errors) of law.
2. A declaration that the Appellant is not a public authority under subparagraph (vii) of Article 3(1) of the Regulations.
3. If necessary, case management directions in respect of a challenge to the vires and the constitutionality of the Regulations.
4. Such further and other relief as this Honourable Court may deem fit.



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5. Costs.

AND FURTHER TAKE NOTICE that this application will be grounded upon this Notice of Motion, the Affidavit of Niamh O'Brien sworn herein on the 28 day of November 2011, together with the Exhibits referred to therein, the nature of the case and the reasons to be offered.

AND FURTHER TAKE NOTICE that the within statutory appeal shall be based, inter alia, on the following errors of law:

- (1) The Respondent erred in law in interpreting the European Communities (Access to Information on the Environment) Regulations 2007 ("the Regulations") so as to hold that the Appellant is a public authority under subparagraph (vii) of Article 3(1) of the said Regulations.
- (2) The Respondent erred in law in not interpreting Article 3(1) so as to hold that a body will only constitute a public authority for the purposes of the Regulations if it falls within paragraphs (a) - (c) of the definition of a public authority. The effect of paragraphs (i) - (vii) is to clarify the types of body which may be included within paragraphs (a) - (c). However, the fact that a body (such as the Appellant) falls within one of the paragraphs (i) - (vii) will not render that body a public authority unless it also falls within one or more of paragraphs (a) - (c).
- (3) The Respondent erred in law in interpreting Article 3(1) of the said Regulations in so far as her interpretation renders the words "and includes" to read effectively as "and also includes", thereby erroneously extending the scope of the Regulations beyond the definition of public authority in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information.
- (4) The Respondent erred in law in failing to hold that the final words of subparagraph (vii) in Article 3(1), namely: *"having public administrative functions and responsibilities, and possessing environmental information"*, are intended to and do qualify each of the subparagraphs at (I) to (IV). It follows that even if, which is not accepted, the definition is expanded by the use of the word "includes", the fact that the Appellant does not have public administrative functions and responsibilities or possess environmental information means that it is not a public authority.
- (5) The Respondent erred in law in interpreting the use of the word "includes" in Article 3(1) of the said Regulations as being a word of expansion and thus as mandating and/or as justifying giving an expanded scope to the Article.
- (6) If the interpretation that was given by the Respondent can be borne by the words used in Article 3(1), which is denied, then the Respondent erred in law in not holding that such an interpretation would be absurd and in not reading the words so as to avoid such a result.
- (7) In particular the Respondent erred in law in failing to hold that it would be absurd that a company in the direct ownership of a Minister would be

automatically defined as a public authority without any further conditions applying, whereas a subsidiary company indirectly owned by the Minister would only be a public authority if it had public administrative functions and responsibilities.

- (8) The Respondent erred in law in failing to properly interpret Article 3(1) of the Regulations in the light of their parent Directive, namely Directive 2003/4/EC of 28 January 2003, and in particular Article 3 of the said Directive and as a result the Respondent erroneously extended the scope of the Regulations.
- (9) The Respondent erred in law in failing to pay due, or any, regard to the Constitutional status of the Regulations as regulations made under the European Communities Acts 1972-2009.
- (10) The Respondent erred in law in failing to properly interpret Article 3(1) of the Regulations in the light of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).
- (11) The Respondent erred in law in failing to properly interpret Article 3(1) of the Regulations in the light of the Access to Information on the Environment Regulations 2007 Department of the Environment, Heritage and Local Government Guidance Notes (2007).
- (12) The Respondent erred in holding that the State has chosen to take an expansionist approach to the Directive in the manner in which it has worded Article 3(1).
- (13) The Respondent erred in law in holding that the language of the Regulations was neither obscure nor ambiguous and in holding that she could not abandon what she characterised as "the plain language" of the Regulations in favour of an interpretation which is more in keeping with the provisions of the Directive.
- (14) The Respondent erred in law in holding that the decision in *The Governors and Guardians of the Hospital for the Relief of Poor Lying-In Women and the Information Commissioner* [2009] IEHC 315 was supportive and/or consistent with her interpretation of Article 3.
- (15) The Respondent erred in law in failing to hold that the ejusdem generis principle properly applies to the interpretation of Article 3(1) and in erroneously holding that subparagraphs (a) to (c) in the definition of "public authority" do not describe a particular class or genus.
- (16) The Respondent erred in law in holding that there was no necessity to consider whether the Appellant is captured also by any of the categories (a), (b) or (c) as contained in the definition in Article 3 of the Regulations.
- (17) Such further or other grounds as may be argued at the hearing of this appeal.

Dated this 28 day of November 2011

Signed: McCann Fitzgerald
McCann Fitzgerald Solicitors
Solicitors for the Appellant
Riverside One
Sir John Rogerson's Quay
Dublin 2

To: The Central Office
High Court
Four Courts
Inns Quay
Dublin 7.

And to: The Commissioner for Environmental Information
18 Lower Leeson Street
Dublin 2.

And to: Mr Gavin Sheridan
Room 205
Business Incubation Centre
National College of Ireland
Mayor Square.
Dublin 1.

THE HIGH COURT

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13(1) OF THE EUROPEAN
COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS
2007

Between:-

IRISH BANK RESOLUTION CORPORATION LIMITED (Formerly known as ANGLO IRISH
BANK CORPORATION LIMITED)

Appellant

-and-

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent

-and-

GAVIN SHERIDAN

Notice Party

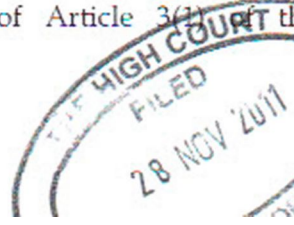
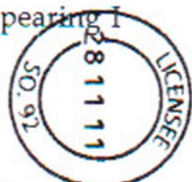
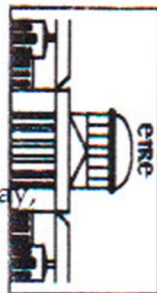
AFFIDAVIT OF NIAMH O'BRIEN

I, Niamh O'Brien, of McCann FitzGerald Solicitors, Riverside One, Sir John Rogerson's Quay,
Dublin 2, Solicitor, aged eighteen years and upwards, MAKE OATH and say as follows:-

1. I am a solicitor in McCann FitzGerald Solicitors and I make this affidavit on the Appellant's behalf and with its authority and consent. I make this affidavit from facts within my own knowledge, save where otherwise appears, and where so appearing I believe the same to be true and accurate.

Introduction

2. I make this affidavit for the purpose of grounding the Appellant's appeal from the Decision made by the Respondent on 29 September 2011 (as notified to the Appellant on 30 September 2011), in Case Number CEI/10/0007, to the effect that the Appellant is a public authority under subparagraph (vii) of Article 3(1) of the European



Communities (Access to Information on the Environment) Regulations 2007 (S.I. No 133 of 2007) ("the Regulations"). I beg to refer to a copy of the said Decision upon which marked with the letters and number "NOB1" I have signed my name prior to the swearing hereof.

3. I say that the Appellant is a company under the Companies Acts and was formerly known as Anglo Irish Bank Corporation Limited. The Appellant was nationalised on 21 January 2009 under the Anglo Irish Bank Corporation Act 2009 and, consequently, all of its shares are now held by or on behalf of the Minister for Finance. I beg to refer to a copy of the 2009 Act when produced.
4. With effect from 14 October 2011, the name of the Appellant was changed from Anglo Irish Bank Corporation Limited to Irish Bank Resolution Corporation Limited (trading as "IBRC").
5. The Appellant is a private limited company and a licensed bank, regulated by the Central Bank of Ireland. Notwithstanding the transfer of the shares of the Appellant to the Minister for Finance on 21 January 2009 pursuant to the Anglo Irish Bank Corporation Act 2009, the Board of the Appellant continues to be responsible for the day-to-day management and operations of the Appellant. Decisions on certain limited public interest matters are reserved to the Minister for Finance pursuant to the Relationship Framework between the Minister and the Appellant, but otherwise it is the Board of the Appellant which is responsible for decisions relating to the Bank. The objective of the Board in managing the business of the Appellant is to maximise recovery in the interest of the taxpayer, having regard to the public interest and fair treatment of customers and creditors.

The chronology of events

6. I have prepared a booklet of the materials that led up to the Decision upon which marked with the letters and number "NOB2" I have signed my name prior to the swearing hereof. In the chronology of events below I refer only to the key events in the correspondence.
7. In a request made to the Appellant, dated 8 February 2010, Mr Gavin Sheridan sought access under the Regulation to the various records. I beg to refer to copy of the request dated 8 February 2010 at pages 1-3 of exhibit "NOB2".
8. In a second request dated 12 February 2010, Mr Sheridan sought access to additional records. I beg to refer to copy of the request dated 12 February 2010 at pages 4-6 of exhibit "NOB2".

9. By letter dated 3 March 2010 the Appellant declined the requests primarily on the basis that it was not a public authority within the meaning of the Regulations. I beg to refer to copy of the letter dated 3 March 2010 at pages 7-8 of exhibit "NOB2".
10. By letter dated 5 March 2010, Mr Sheridan sought an internal review of the said decision. I beg to refer to copy of the letter dated 5 March 2010 at pages 9-11 of exhibit "NOB2".
11. By letter dated 30 March 2010 the Appellant wrote to Mr Sheridan confirming that an internal review of the decision had been carried out, and the conclusion reached was that the decision to decline the requests was correct on the basis that it was not a public authority within the meaning of the Regulations. I beg to refer to copy of the letter dated 30 March 2010 at page 12 of exhibit "NOB2".
12. By online letter dated 1 April 2010, Mr Sheridan appealed to the Respondent against the Appellant's decision. I beg to refer to copy of the letter dated 1 April 2010 at pages 13-15 of exhibit "NOB2".
13. By letter dated 7 April 2010 the Respondent informed the Appellant that she had received an application from Mr Sheridan and asked the Appellant to provide certain documentation. I beg to refer to copy of the replying letter dated 7 April 2010 at page 16 of exhibit "NOB2".
14. By letter dated 14 April 2010 the Appellant forwarded the requested documentation to the Respondent. I beg to refer to copy of the letter dated 14 April 2010 at page 17 of exhibit "NOB2".
15. By letter dated 20 April 2010, the Respondent wrote to the Appellant stating that it had accepted the appeal of Mr Sheridan and invited a submission from the Appellant by 12 May 2010. I beg to refer to copy of the letter dated 20 April 2010 at page 18 of exhibit "NOB2".
16. By letter dated 26 April 2010, the Appellant wrote to the Respondent requesting that as the Appellant's decision was based on the view that it was not a public authority for the purposes of the Regulations, it would be more efficient if the Respondent would determine this question as a preliminary matter. I beg to refer to copy of the letter dated 26 April 2010 at page 19 of exhibit "NOB2".
17. The Appellant made a submission to the Respondent dated 12 May 2010 in which it set out why it believed that it is not a public authority under Article 3(1) of the Regulations. I beg to refer to copy of the initial submission dated 12 May 2010 at pages 20-36 of exhibit "NOB2".
18. By letter dated 12 August 2010, the Appellant wrote to the Respondent, by way of a short supplemental submission, referring the Respondent to the decision of Mr Justice

O'Neill in the High Court in *An Taoiseach v Commissioner for Environmental Information* (4 June 2010). I beg to refer to copy of the first supplemental submission dated 12 August 2010 at pages 37-38 of exhibit "NOB2".

19. By email dated 3 November 2010 the Respondent sent Mr Sheridan a copy of this submission and invited him to make a reply. I beg to refer to copy of this email dated 3 November 2010 at pages 39-40 of exhibit "NOB2".
20. Mr Sheridan made a replying submission to the Respondent dated 8 December 2010 in which he set out why he believed that the Appellant is a public authority. I beg to refer to copy of the replying submission dated 8 December 2010 at pages 41-47 of exhibit "NOB2".
21. By email dated 2 March 2011 the Respondent sent the Appellant an outline of its views and invited the Appellant to address the matter further. I beg to refer to copy of this email dated 2 March 2011 at pages 48-49 of exhibit "NOB2".
22. The Appellant duly made a supplemental submission to the Respondent dated 10 March 2011. I beg to refer to copy of the second supplemental submission dated 10 March 2011 at pages 50-58 of exhibit "NOB2".
23. By email dated 25 May 2011 Mr Sheridan narrowed the scope of his request for information. I beg to refer to copy of the said email dated 25 May 2011 at page 59 of exhibit "NOB2".
24. By letter dated 27 May 2011 the Respondent explained that Mr Sheridan had narrowed down his request for information. The Respondent also enclosed her revised preliminary views on the matter and explained that this was a revised preliminary view in the sense that she had changed her mind since issuing a previous preliminary view in which she had held that National Assets Management Agency ("NAMA") was not a public authority. She clarified that she was now of the view that both the Appellant and NAMA were public authorities for the purposes of the Regulations. I beg to refer to copy of the letter dated 27 May 2011 at pages 60-92 of exhibit "NOB2".
25. By letter dated 7 June 2011, the Appellant wrote to the Respondent stating that it did not agree with the Respondent's preliminary view that the Appellant is a public authority for the purpose of the Regulations and that the Appellant intended to make further submissions in this matter. The Appellant stated that it was concerned to learn that the Respondent considered Mr Sheridan's request to the Appellant together with an unrelated request of Mr Sheridan to NAMA. The Appellant also sought copies of all submissions made in respect of the request by Mr Sheridan to NAMA. I beg to refer to copy of the letter dated 7 June 2011 at pages 93-94 of exhibit "NOB2".
26. By letter dated 7 June 2011, the Respondent wrote to the Appellant enclosing a copy of the submissions requested and summarised the basis for her revised preliminary views

dated 27 May 2011. I beg to refer to copy of the letter dated 7 June 2011 at pages 95-96 of exhibit "NOB2".

27. For the sake of completeness I have enclosed in the booklet of papers a copy of the previous preliminary view dated 29 June 2010 in which the Respondent had held that NAMA was not a public authority. I beg to refer to copy of the preliminary review dated 29 June 2010 at pages 83-92 of exhibit "NOB2".
28. The Appellant duly made a further supplemental submission to the Respondent dated 21 June 2011. I beg to refer to copy of the third supplemental submission dated 21 June 2011 at pages 97-106 of exhibit "NOB2".
29. The Respondent notified the Appellant of her final Decision by way of letter dated 29 September 2011, which was received by the Appellant on 30 September 2011 which I have exhibited at "NOB1". It will be seen from the Decision that the Respondent maintained the position she had set out in the revised preliminary view and concluded that the Appellant is a public authority under subparagraph (vii) of Article 3(1) of the said Regulations.

The Appeal

30. The Appellant respectfully submits that the Respondent has made an error or errors of law in holding that the Appellant is a public authority under subparagraph (vii) of Article 3(1) of the said Regulations. In this regard I beg to refer to the grounds of appeal set out in the Notice of Motion filed herein.
31. I am advised that the merits of the grounds of appeal are a matter for legal submission at the hearing of this appeal and that it is inappropriate to debate them by way of affidavit.
32. I am advised that the Appellant is not part of the Government or public administration. It does not perform any public administration functions. It does not have any public responsibilities or functions or provide any public services.
33. The Appellant therefore respectfully believes that as it does not fall within any of subparagraphs (a), (b) or (c) of Article 3(1) of the Regulations it is not a public authority.

Other matters

34. I say that the Appellant says and has been advised that if the interpretation given to the Regulations by the Respondent is correct then the Regulations are ultra vires and/or unconstitutional. In the event that such an interpretation were to be confirmed on this appeal then it is the intention of the Appellant to challenge the validity of the

Regulations. Should that be necessary then the Appellant will ask this Court to give case management directions in respect of such additional proceedings as may prove necessary.

Prayer

35. I therefore Pray this Honourable Court to grant the relief sought in the Notice of Motion herein.

SWORN BY THE SAID

on 28th day of November 2011

at FitzGerald's Quay, 2 Sir John Rogerson's Quay.

in the County of the City of Dublin

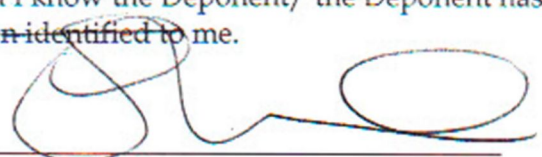
before me a Practising Solicitor/

✓ ~~Commissioner for Oaths~~ ✓

and I know the Deponent/ the Deponent has

✓ ~~been identified to me.~~

Niamh O'Brien


Practising Solicitor/ ~~Commissioner for Oaths~~

This affidavit is filed on behalf of the Appellant on 28 day of November 2011 by McCann FitzGerald, Riverside One, Sir John Rogerson's Quay, Dublin 2.